REMARKS

The Office Action dated October 27, 2008 has been fully considered by the Applicant.

By way of the present amendment, independent Claims 37, 45, 55, and 57 have each been amended.

The rejection of Claims 37-39, 42-45, and 50-59, as now amended, under 35 U.S.C. § 103(a) as being unpatentable over Fields (U.S. Patent No. 5,973,037) in view of Helf (U.S. Patent No. 6,248,396) and Harver et al. (*Fatigue Resistance...*, Oct. 1995) is respectfully traversed. Likewise, the rejection of Claim 40 under 35 U.S.C. § 103(a) as being unpatentable over Fields in view of Helf and Harvey and further in view of Grubba (U.S. Patent No. 5,795,929) is respectfully traversed, as is the rejection of Claims 46, 47, 49, and 54 under 35 U.S.C. § 103(a) as being unpatentable over Fields in view of Helf and Harvey and further in view of Walter (U.S. Patent No. 3,907,582) and the rejection of Claim 48 under 35 U.S.C. § 103(a) as being unpatentable over Fields in view of Helf and Harvey and further in view of McDonald (U.S. Patent No. 3,891,585).

Independent Claims 37, 45, 55, and 57 have each been amended to include the requirement that "the mineral aggregate is present in the at least one asphalt mixture in an amount greater than about 89% and less than about 93% by weight of the at least one asphalt mixture." This is a change from the previously submitted claims in that it adds the bottom limit of "greater than about 89%" to the amount of mineral aggregate present in the asphalt mixture. This change is not new matter, as it is supported in paragraph [0052] of the specification, which states that binder is mixed with aggregate and the mixture preferably includes about 7-11% by weight binder. As there are no other components of the mixture listed, this implies that the mixture includes about 89-93% by weight aggregate.

This element is not present in Fields, [1] Helf, or Harvey, and thus is not obvious in view of the combination thereof. The Examiner recognized this in the Office Action dated October 27, 2008, stating

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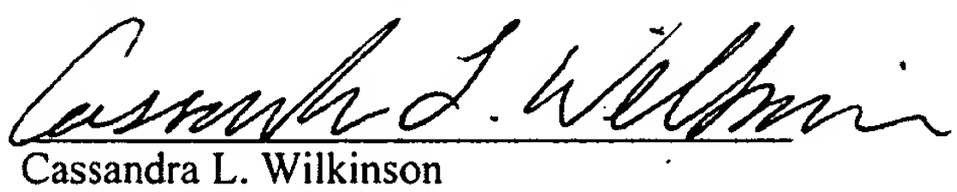
[1] The Examiner, in section (7)(A) of the Office Action, refers to Collins, a previously cited prior art patent that is not cited in the present Office Action, but references content and column and line numbers for Fields. Therefore, the Applicant assumes that the Examiner intended to reference Fields rather than Collins.

that "this reference does not expressly teach any hard aggregate,[2] which reads on the claimed 'less than 93% by weight,' which is inclusive of 0%." The present amendment removes the inclusion of 0% by providing for a bottom limit to the amount of aggregate present in the asphalt mixture. Thus, independent Claims 37, 45, 55, and 57 all call for the presence of mineral aggregate in the mixture, which is not taught in Fields, Helf, Harvey, or any combination thereof. Thus, Claims 37, 45, 55, and 57 are not unpatentable over Fields in view of Helf and Harvey.

Claims 38 through 44 are dependent on Claim 37, Claims 46 through 54 are dependent on Claim 45, Claim 56 is dependent on Claim 55 and Claims 58 and 59 are dependent on Claim 57, and all are believed allowable for all of the same reasons.

It is submitted that the application is now in condition for allowance and such action is earnestly solicited. The Commissioner is authorized to charge any additional fees associated with this application or credit any overpayment to Deposit Account No. 08-1500.

Respectfully submitted,



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[2] The Examiner refers to "hard aggregate," which was previously an element of the claims but was previously amended to "mineral aggregate." Therefore, the Applicant assumes that the Examiner intended "mineral aggregate" instead of "hard aggregate."